IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, *et al.*,
Petitioners,

—v.—

APOLINAR NAVARETTE, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

APOLINAR NAVARETTE, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus [1/]

The American Civil Liberties Union is

1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

a nationwide, nonpartisan organization of over 250,000 members. It is organized solely for the purpose of protecting the civil rights and liberties of Americans. The American Civil Liberties Union has been in existence since 1920. One of the constant concerns of the organization has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Amicus is most concerned about the importance of protecting citizens civil rights and liberties by imposing sanctions against those state officials who abuse their office or are indifferent to the rights of those they are alleged to serve. We have been concerned that recent decisions of the Court have hampered the historic role of the United States District Courts in implementing remedies for such violations of civil rights. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Paul v. Davis, 424 U.S. 693 (1976); Hicks v. Miranda, 422 U.S. 332 (1975). One of our concerns is that this case, in which the Court of Appeals followed settled law in concluding that the plaintiffs, alleging that prison officials negligently failed to carry out their clearly established constitutional duties, presented a claim sufficient to withstand summary judgment, not become a vehicle for the overruling or narrowing of Monroe v. Pape, 365 U.S. 167 (1961).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 536 F.2d 277.

QUESTION PRESENTED

Can negligent actions by prison officials ever serve as the basis for a suit under 42 U.S.C. §1983?

STATEMENT OF THE CASE

The only issue before this Court is whether the plaintiff's third cause of action in his amended complaint was properly upheld by the Court of Appeals. That claim charged that three subordinate Soledad Prison correctional officials "negligently and inadvertently misapplied the prison mail regulations" in effect at the time and as a result certain of plaintiff's letters to certain newspapers failed to reach their destination. The third cause of action also includes a claim against three supervisory prison officials for their "negligent failure to furnish" the subordinate officials with sufficient training regarding evaluation of prisoner mail, in other words, for negligently failing to train and supervise the subordinate officials. The Court of Appeals held that this cause of action stated a valid claim and that the affi-

davits submitted on behalf of the defendants were insufficient to justify summary judgment.

Introduction and Summary of Argument

This case could be disposed of by the Court quite simply. It is well-established that an action may be dismissed at the pleading stage only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Since the complaint alleges that the subordinate prison officials negligently and inadvertently failed to mail certain letters and that their superiors negligently failed to train and supervise them, the plaintiff should be allowed to prove his claim. The petitioners admit that "deliberate indifference" could be the basis of a Section 1983 action (Petitioners Brief, at 9), as could an "unwillingness to act in the face of a known duty to do so." (Ibid. at 6). This Court should easily construe plaintiff's complaint as fitting within that standard and remand the case for trial, in accordance with the Ninth Circuit's decision below. But the State of California has instead asked this Court to take a giant step backward in interpreting Section 1983. There is no need to do so under any circumstances and, for the following reasons, there is certainly no basis for doing so here.

Petitioners misconstrue Section 1983 in claiming that negligence cannot be the basis for a civil rights suit. Previous §1983 cases have dealt with problems of defining "person," "state" or the constitutional right involved. But these cases do not relate to whether the conduct complained of must be volitional or negligent.

In fact, the development of the good faith defense in §1983 cases undercuts petitioners' position. The theory of the good faith defense is that a state official should not be held answerable in damages if he reasonably believed in the legality of his acts. The touchstone of the defense is what a reasonable state official would believe he could do in the circumstances. Negligence theory applies the same approach: what risks to a constitutional right would a reasonable state official foresee with respect to his actions. A reasonable man test is used in both areas for the same reason: Section 1983 demands of state officials that they be concerned about unreasonable risks to constitutional rights and unreasonable assumptions about the legality of their conduct.

Negligence does not involve any good or bad faith by a state official. It involves the unreasonable assumption of risk. If the risk is to a constitutionally protected right, then Section 1983 should apply. Viewed from another per-

spective, if the negligence involves an unreasonable risk to the constitutional rights of a wide number of citizens, the basic promise of Section 1983 would be violated by refusing to recognize a cause of action.

Lower federal courts have consistently upheld Section 1983 cases based upon the negligence of state officials, particularly when the negligence relates to their training and supervision of personnel under their command. That is precisely what is involved in the instant case.

ARGUMENT

A Claim of Negligence Can Validly Serve as a Proper Basis for Relief Under Section 1983.

The simplicity of the question presented in this case masks the revolutionary step which the State of California is asking this Court to take. By confusing a series of separate elements in the §1983 cause of action, the California prison officials are asking this Court virtually to wipe out one phase of §1983 jurisprudence, to eliminate an important protection for citizens' rights and to overrule a long line of precedents upholding claims such as those involved in the instant case. There is no justification for gutting Section 1983 in this manner.

A. The Petitioners Misconstrue the Scope of the Section 1983 Cause of Action.

Petitioners basic misconception is to treat Section 1983 cases as if they had but a single component. They argue that such cases are confined to intentional conduct by state officials. In support of this notion they treat a series of this Court's decisions in §1983 actions as if they involved a continuous development of a single theme leading to the conclusion the petitioners urge. But a closer look at the cases cited by petitioners demonstrates that the cases involved entirely

different components of a 1983 action than that involved in this action.

To succeed in a Section 1983 action, a citizen must show that he was deprived of a right, privilege or immunity secured by the Constitution or federal law through the actions of a person acting under color of law of a state. These elements have been before the Court a number of times.

Thus this Court held that the term "person" does not include a municipality, Moor v. County of Alameda, 411 U.S. 693 (1973), and the term "state" does not include the District of Columbia, District of Columbia v. Carter, 409 U.S. 418 (1973).

This Court has also held that rules on standing, injury, and case and controversy apply as well to Section 1983 actions. See Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); Rizzo v. Goode, 423 U.S. 362 (1976).

Finally, this Court has established special rules on immunity in suits for damages against state officers sued under Section 1983. In Pierson v. Ray, 386 U.S. 547 (1967), this Court held that a police officer does not have to anticipate constitutional changes and cannot be held liable in damages for an arrest under a law later held unconstitutional. In Scheuer v. Rhodes, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308 (1975), and O'Connor v. Donaldson, 422 U.S. 563

(1975), this Court established the test of qualified, good faith immunity for state officers sued for damages.

These cases are treated by the petitioners as if they all dealt with the problem now before this Court. But none of them has anything to do with the issue of whether the conduct of the state official must be volitional or negligent. In fact, the implications of those cases are contrary to the petitioners' position.

This Court established a good faith defense in Wood v. Strickland, with both a subjective and an objective "reasonable man" component. A state official cannot be held liable for intentional acts if he sincerely believed in the legality of his acts and if that belief was reasonable. That approach can be applied precisely to negligent acts as well.

Prosser has written: "In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them." Prosser, Handbook of the Law of Torts, (4th ed. 1971) (hereafter "Prosser on Torts"), at 145. If a state official foresees that a constitutionally protected right of a citizen is endangered by his acts or omissions, he will be liable

under traditional Section 1983 principles. However, if he does not foresee such a danger, but a reasonable man in his position would have done so, he should also be liable.

The good faith defense set out in Wood v. Strickland already utilizes the reasonable man approach which is at the heart of negligence theory. If a police officer arrests a person under a vagrancy law already held unconstitutional, he may sincerely believe he has the right to do so. But a federal court could well conclude that the officer "reasonably should have known that the action he took... would violate the constitutional rights of the [person] affected..." Wood v. Strickland, 420 U.S. at 322. Thus he would be held liable.

The negligence theory is simply an application of the good faith defense at an earlier stage, to the conduct itself, instead of at the stage of a fact-finder viewing its presumptive legality. If a state officer reasonably should have known that his actions or omissions would have caused an injury to a constitutionally protected right of a citizen, then he should be held liable.

In standard negligence theory, a plaintiff can succeed if he shows: (1) a duty recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure on his part to

conform to the standard required; (3) a reasonably close causal connection between the conduct and the resulting injury; (4) actual loss or damage. Prosser on Torts, at 143.

Section 1983 requires an injury to a constitutionally protected right. Thus this approach will not increase suits against state officers since lower courts have long recognized negligence as the basis for a Section 1983 action. 2/

2/ Petitioners claim that recognizing negligence as the basis for a Section 1983 action will significantly increase the number of civil rights suits brought to the overcrowded federal courts. That claim is wrong. As noted in the text, federal courts have long recognized negligence as the basis for such suits. In addition, the increase in civil rights suits since 1960 is due in part to passage of laws against employment discrimination, discrimination in public accomodations, infringement of voting rights and so on. The rubric of "civil rights" suits used by the Administrative Office of the United States Courts is not equivalent to Section 1983 actions. See Friedman, The Good Faith Defense in Constitutional Litigation, 5 Hofstra L. Rev. 501, n. 1 (1977).

Similarly, this Court has limited the applicability of 18 U.S.C. Sections 241 and 242 to criminal acts which specifically interfere with interests protected by a clearly delineated constitutional right. See Anderson v. United States, 417 U.S. 211 (1974); United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976). In the same way, requiring that the foreseeability of injury be limited to constitutionally protected rights will limit the number of negligence cases against state officials.

In short, basic principles of tort liability can be and should be applied to the situation before this Court. Just as a person cannot be allowed to disregard well-established constitutional rights, he cannot be permitted to overlook the dangers to those rights which a reasonable man would foresee.

In addition, the broad proposition urged by the petitioners would apparently apply to suits for injunctive relief as well as for damages. But the development of the good faith defense has been carefully limited to the issue of damages. Whether or not the Mississippi policeman in Pierson, the Ohio National Guard officials in Scheuer, the Arkansas school administrators in Wood and the Florida hospital officials in O'Connor were ultimately liable for damages, if their conduct was held to be unconstitutional, it can and must be enjoined and declared invalid. If

a federal court finds a constitutional violation, it must grant such relief so long as Congress has given the court power and jurisdiction to do so - as it has done in a Section 1983 case. As the District of Columbia Circuit explained in National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974):

> A good faith defense in a suit for damages brought against any federal official as an individual is seemingly established by Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972) on remand from the Supreme Court, 403 U.S. 388 (1971), but that defense is not assertable in the face of a quest limited to injunctive, declaratory or mandamus relief. 3/

In the same way, any negligent interference with a person's constitutional rights must be declared invalid and enjoined. If prison officials negligently interfere with the First Amendment rights

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3/ Although the NTEU case involved a suit against a federal official, federal courts have applied the same standards of immunity for both federal officials sued in a Bivens-type action and state officials sued in a Section 1983 action. See Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975).

of prisoners, see Procunier v. Martinez, 416 U.S. 396 (1974), their Fifth and Sixth Amendments rights, see Wolff v. McDonnell, 418 U.S. 539 (1974), or their Eighth Amendment rights, see Estelle v. Gamble, ___ U.S. ___, 50 L.Ed. 2d 251 (1976), federal courts must stop those actions regardless of whether they were negligent or intentional.

The problem of personal liability for damages for negligent acts involves precisely the same considerations as those involved in the good faith defense outlined by this Court in Wood v. Strickland, supra - a balancing between the need for vigorous administration of the laws and the need to protect citizens' rights. As noted below, the line between volitional or intentional acts and negligent acts is often difficult to draw - which is precisely why plaintiff in this case alleged in one cause of action that there was an intentional failure to mail his letters and in another cause of action that there was a negligent failure by the defendants.

The basic theory of the Section 1983 cause of action is that state officers clothed with the enormous power of their office have the potential of doing great damage to the citizens whom they serve. If they misuse that power deliberately to cause injury to rights protected by the Constitution, they must answer in damages. Similarly, if their actions, though inadvertent or negligent, have the potential

to do injury to the constitutionally-protected interests of many citizens whom they are serving, Section 1983 should provide relief. There is no interest to be served by encouraging state officers to be careless or inadvertent or indifferent with respect to the rights of the citizens they serve. "Any lesser standard would deny much of the promise of §1983." Wood v. Strickland, 420 U.S. at 322.

B. Petitioners Misconstrue the Nature of Negligence in a Section 1983 Cause of Action.

There are at least three separate definitions of the term "negligence" which the California state petitioners confuse in their brief. (1) Negligence may mean carelessness generally, a lack of ordinary care; (2) negligence may often be used to signify a particular state of mind with which an act is done - "a mental element, usually one of inadvertence or indifference," Prosser on Torts at 139. (3) Negligence may also mean conduct itself, an instance of carelessness or inattention or omission to act when the opposite would be expected of a reasonable person.

The legal definition tracks the third meaning noted above. In Prosser's definition of the term:

> Negligence is a matter of risk - that is to say, of recognizable danger of injury. It has

> been defined as "conduct which involves an unreasonably great risk of causing damage" or... conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." "Negligence is conduct, and not a state of mind." Ibid. at 145.

Thus the petitioners are totally in error when they cite this Court's decisions in the cases dealing with the good faith defense as supporting their position. It is true that negligent conduct does not involve "bad faith" or "malice." But that is irrelevant. In the first place, Section 1983 cases do not require an allegation or showing of bad faith or malice, as this Court made clear in Wood v. Strickland. Secondly, good or bad faith are totally irrelevant when dealing with negligent actions. Judge Swygert of the Seventh Circuit recently pointed out, in a dissent in Bonner v. Coughlin, 545 F.2d 565, 573 (7th Cir. 1976)(dissent), that there can be no good faith in a negligence action:

> This argument collapses upon examination. Its underlying premise is that good faith is nothing but the absence of bad faith, and since an official can only act in bad faith when he is acting intentionally, a nonintentional act can never be in bad faith. While it may be true that a nonintentional act cannot be

> in bad faith, it is not true that good faith is simply the absence of bad faith. Good faith requires that "[t]he official himself [is] acting sincerely and with a belief that he is doing right." Wood, 420 U.S. at 321. Such an affirmative belief is only possible with respect to intentional acts. It is nonsensical to speak of committing a negligent act in good faith.

There are some acts of prison officials that do not serve as the basis for a §1983 action, - when a constitutional right is not involved. For example, in Bonner v. Coughlin, supra, the Seventh Circuit en banc held that prison guards cannot be held liable under §1983 for "negligently" leaving the plaintiff's cell door open after a security search, which conduct resulted in the loss of his trial transcript. Plaintiff claimed that his property was taken without due process of law and thus that he had the basis for a Section 1983 suit. The Seventh Circuit rejected his claim. The court cited this Court's recent decision in Paul v. Davis, 424 U.S. 693 (1976), and found that the plaintiff "has pointed to no specific constitutional guarantee against the negligence of the two prison guards," 545 F.2d at 567. But Paul v. Davis dealt with the nature of the constitutional right and not the state of mind with which an act was done or the doing of the act itself. Thus the Bonner decision merely means that there

was no due process right to begin with in the circumstances of the case. 4/

If a prison guard, knowing that his car has bad brakes, negligently runs over a prisoner in an exercise yard, there may be no Section 1983 action. This is true because no constitutional right is infringed even if state law would permit such a suit. But if he intentionally or inadvertently or negligently failed to allow a prisoner to go to religious services in prison, then different considerations apply, as explained below.

Similarly, this Court in Estelle v. Gamble, supra, focused on the nature of the constitutional right involved. This Court held that the "infliction of...unnecessary suffering" upon prisoners by denial of medical care is a violation of the Eighth Amendment. 50 L.Ed.2d at 259. The reach of the Eighth Amendment right includes protection against the infliction of such

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4/ The Seventh Circuit in its opinion seemed to confuse the nature of the constitutional right involved and the injury which plaintiff had suffered since a copy of the transcript was later returned. The Court also questioned whether there was any state action because the loss of the transcript occurred after the state action had ended. However, at the heart of the opinion was the parallel with Paul v. Davis, which is discussed above.

pain through the "deliberate indifference to a prisoner's serious illness or injury." Ibid. at 260. This Court noted,

> a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Ibid. at 261.

In short, the Eighth Amendment right itself is defined to protect against deliberate indifference to a prisoner's medical needs. The right itself does not include protection against negligent treatment or diagnosis.

Another approach to this problem was suggested in Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976). In that case, the Fifth Circuit en banc had to consider the liability of a sheriff for negligently failing to release a prisoner after the District Attorney had dismissed all charges against him. He stayed in jail for 35 days after after the dismissal. He then sued under §1983 for false imprisonment. The Fifth

Circuit held that the sheriff was entitled to an instruction on the good faith defense even if Texas law did not recognize it. Further it held that while his negligence in one case might not be enough to incur liability, "[i]f he negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable." 530 F.2d at 1215.

Where negligence of state officials has the potential for inflicting widespread harm to the individuals they are serving, such acts must be the basis for a §1983 action. 5/ Where the negligence relates to a system of training and supervision, the likelihood is great that the acts in question will have continuing impact and will injure other citizens. In those situations, such as that involved here, the purpose of Section 1983 requires a recognition of the cause of action.

C. Lower Federal Courts Have Consistently Recognized the Validity of Claims Similar to That Involved in This Action.

Petitioners have misapprehended the nature of negligent violations of civil rights. By focusing their attention on examples of personal injury actions (e.g.,

5/ See Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 520-522 (1977).

Kent v. Prosse, 265 F.Supp. 673 (W.D. Penn. 1967), Petitioners Brief at 18, (where a prisoner was injured by a piece of faulty machinery), they would have the Court believe that such matters are representative of the character of negligent violations of civil rights recognized by the federal courts. This could not be further from the truth. Nor is it comparable to the situation presented in this case. The conduct on which plaintiff bases his complaint is that of a negligent failure by an official to perform his duty. This negligent conduct directly resulted in the violation of plaintiff's "clearly established" constitutional rights. Examined in this light, the decision of the Court of Appeals is exactly in line with the trend of recent lower court holdings on this issue.

In a 1972 case similar to the cause of action asserted by plaintiff, the Fifth Circuit held in Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972); cert.denied, 404 U.S. 866 (1971), that a supervisor could be held to account under §1983 for his "failure to train and supervise" a prison trusty. It was the prison trusty's negligence in the use of a shotgun which was the immediate cause of the plaintiff prisoner's injury. However, the Court held that the "superintendent" of the County Farm, who was responsible for supervising the trusty system, was properly subject to liability under §1983 in Roberts' action "based on negligence," supra, at 826.

Two Court of Appeals decisions subsequent to Roberts v. Williams, amplified this holding. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972), concerned a civil rights action filed against several Chicago policemen in the beating of the plaintiff, Thomas Byrd, in the backroom of a local tavern. The District Court directed a verdict for the defendants which was reversed by the Seventh Circuit. In an opinion by Chief Judge Swygert, the court held that in addition to the liability of those who participated in the beating, a §1983 suit could be maintained against those supervisory and non-supervisory officers who negligently failed to protect the plaintiff. The Seventh Circuit stated the principle of tort liability for negligence by citation to a pertinent passage of a lower court opinion, as follows:

> Negligent liability generally arises in the context of affirmative action. The defendant is seemed culpable where he has acted and his acts do not conform to the standard of a reasonably prudent man as judged against the community ideal of reasonable behavior. See Prosser, Torts, §§ 53, 54 (3d ed. 1964). The defendant is not usually held to be responsible for inaction. However, where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his

> omission. He is responsible if his omission is unreasonable in light of the circumstances. Huey v. Barloga, 277 F.Supp. 864, 872 (N.D. Ill. 1967); see, Symkowski v. Miller, 294 F.Supp. 1214, 1217 (E.D. Wis. 1969). 466 F.2d at 10.

In the same year, a Police Chief of the City of Atlanta was held liable under Section 1983 for his negligent supervision. In Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972), as in this case, the defendant was sued "on the theory that Williams was negligent in failing to train properly the auxilliary officer, [and] to supervise his patrol duties..." The court, in a per curiam opinion, upheld the judgment in favor of the plaintiff. The judges emphasized that the case was "not one of vicarious liability founded on the theory of respondent superior, but is instead a claim founded upon the defendant's own negligence." Beverly v. Morris, supra at 1357.

Later cases have added further weight to this line of authority. The first was Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). It, too, involved a police chief who was held to be accountable for negligent supervision. In Dewell, the plaintiff suffered a diabetic coma in the police lock-up, allegedly because the chief had "failed to establish procedures within the Oklahoma City Police Department whereby jail personnel of the said Department were

advised of missing persons listed in all points bulletins..." Had such procedures been in effect, the plaintiff alleged, the chief would have been aware that he was holding in his jail as a purported drunk a man who he was already informed was actually a diabetic suffering from a medical emergency. Circuit Judge Barrett reversed the lower court's dismissal of the §1983 action against the Chief of Police. The Court held that the District Court could not, as a matter of law, dismiss Dewell's §1983 claim that Lawson be held liable for being "negligent in not supervising his subordinates..." Dewell v. Lawson, supra, at 881.

Shortly thereafter, a decision was handed down in Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974); cert. denied, 419 U.S. 838 (1974), concerning, as the instant case does, the liability of a warden for the negligent supervision of his staff. In this case the warden was sued under §1983 for his negligent supervision of security operations at the Louisiana State Penetentiary. The plaintiff alleged that this negligence permitted a situation where another prisoner was able to make his way to Parker's bed and attack him with a dangerous weapon. The Circuit Court reversed the summary judgment which had been granted in favor of the warden. In doing so, they went so far as to hold that even an "isolated incident of a negligent failure" to act might under appropriate circumstances support a §1983 action against the warden.

The approach was most recently reaffirmed in the case of Sims v. Adams, 537 F.2d 829 (5th Cir. 1976). The case concerned the negligent failure of supervisory defendants including the Mayor and Chief of Police of Atlanta, to discipline a police officer who was known to be prone to violent acts. Citing Roberts v. Williams, supra, and Beverly v. Morris, supra, Judge Gee reversed the lower court's dismissal as to the liability of these defendants under §1983.

The District of Columbia Circuit took a similar approach in Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); rev'd sub nom (on other grounds), District of Columbia v. Carter, 409 U.S. 418 (1973) which this Court has considered in another context. Although this Court chose not to address the issue of liability for negligence in the supervision of subordinates on certiorari, see, 409 U.S. at 420, n. 3, the District of Columbia Circuit Court had addressed the matter specifically on appeal.

> Even if Captain Prete or Chief Layton is protected by official immunity from suit at common law, they are both subject to suit under §1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights. Indeed, Mr. Justice Frankfurter maintained that §1983 was designed for precisely

such a case, i.e., the case in which the State shields a police officer from liability for conduct which would subject a private citizen to liability. While the Supreme Court has read into the statute immunity for legislators and judges, it has not read into the statute a broad common law immunity for all government officers exercising discretionary functions. In particular, various supervisory officers have been held subject to suit under §1983 for negligence in supervising their subordinates. 447 F.2d at 365 (footnotes omitted).

In short, the lower federal courts have consistently recognized that negligent conduct by state officers can give rise to a Section 1983 action, particularly where the risk of harm to constitutionally protected rights is widespread.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respecfully submitted,

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April, 1977

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* Counsel gratefully acknowledge the assistance of Steven Haft, a third-year student at the Hofstra Law School in the preparation of this brief.